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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 JOHN GILBERT,

4 Plaintiff,

5 v.

09 CV 6352 (KBF)

6 ROBERT INDIANA,

7 Defendant.

8 -----x
9 New York, N.Y.
December 2, 2011
10 9:30 a.m.

11 Before:

12 HON. KATHERINE B. FORREST,

District Judge

13 APPEARANCES

14 CARTER LEDYARD & MILBURN, LLP

15 Attorneys for Plaintiff

16 BY: GARY D. SESSER

JUDITH M. WALLACE

17 RONALD D. SPENCER

18 MEREDITH & KEYHANI, PLLC

Attorneys for Defendant

19 BY: DARIUSH KEYHANI
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(Case called; in open court)

THE DEPUTY CLERK: Counsel please state your name for the record.

MR. KEYHANI: Darius Keyhani of Meredith & Keyhani for the plaintiff, John Gilbert.

THE COURT: Keyhani, is that how you pronounce it?

MR. KEYHANI: Yes, your Honor.

THE COURT: Thank you.

MR. SESSER: Gary Sesser and Judith Wallace, Carter Ledyard & Milburn for defendant Robert Indiana.

THE COURT: Good morning.

MR. SESSER: Good morning.

THE COURT: We are here this morning for a couple of different things. One is that we have got some old business to take care of. Are you having a problem hearing back there?

UNIDENTIFIED PERSON: A little bit.

THE COURT: Are you one of the parties in the matter?

UNIDENTIFIED PERSON: One of the lawyers.

THE COURT: If you want to move up to the jury box, it is fine with me. Which lawyer are you?

UNIDENTIFIED PERSON: Ronald Spencer, Carter Ledyard & Milburn.

THE COURT: Thank you, Mr. Spencer.

We're here for a couple different purposes today. One is to make sure we have all the dates in place that we need for

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1 the future and then also I think to take care of some
2 unfinished business that was started by some letters last April
3 relating to the possibility of joining another individual and
4 it was unclear whether the individual would come with a new
5 claim or would be added to the existing unfair competition
6 Lanham Act claim already in the complaint. So that was the
7 agenda that I had for this morning.

8 Did anybody else have any other items they wanted to
9 raise?

10 MR. SESSER: We also had a request in our letter from
11 April for pre-motion conference on a motion to dismiss for lack
12 of subject matter jurisdiction and motion for summary judgment.
13 That was one of the letters we submitted earlier this week.

14 THE COURT: I do see that. You resubmitted that.
15 What I would like to do is deal first with understanding a
16 little bit about what Mr. Salama Caro -- is that the name of
17 the individual?

18 MR. KEYHANI: Salama Caro as I understand it at least.

19 THE COURT: What is his interest in the works and what
20 did he do that could rise to the level of a Lanham Act
21 violation?

22 MR. KEYHANI: Yes, your Honor, may I sit down
23 speak, is that okay?

24 THE COURT: You can stand when you speak. I meant you
25 could sit down when I first walked in.

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1 MR. KEYHANI: We had subpoenaed a deposition of Mr.
2 Salama Caro. At that point we weren't sure if he was going to
3 be a party or not. So we probably will need some additional
4 testimony from him.

5 THE COURT: How long did that deposition last?

6 MR. KEYHANI: I am going to guess three or four hours.
7 Maybe three. Again, from my recollection. It wasn't a full
8 day. It wasn't a seven-hour day of testimony.

9 If I may step back for a moment and just very briefly
10 summarize the dispute in this case just to give some context.

11 THE COURT: I have read the complaint.

12 MR. KEYHANI: Fine. There is a claim for a breach of
13 contract. There is a Lanham Act claims that John Gilbert is
14 bringing against Robert Indiana. It turns out that Salama Caro
15 was the party -- he is the individual who contacted Sothebys,
16 Christie's we understand and told them, communicated to them I
17 understand at least verbally -- I don't know if there were any
18 writings - that these works that are at issue in this case are
19 not authentic works of Robert Indiana. That claim, that claim
20 that they are not -- that these goods are not authentic works,
21 that these goods are not works that you sponsored, that is
22 whether they are in fact -- they are not associated, they are
23 sponsored, they are not his works. That claim is a claim in
24 which I think there is precedent, a good precedent on that,
25 that it creates the Lanham Act cause of action.

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1 Your Honor, if I may --

2 THE COURT: Let me stop you right there for one
3 second. Was there testimony as to whether or not Mr. Salama
4 Caro was acting as the agent of someone else or was he acting
5 on his own?

6 MR. KEYHANI: Mr. Salama Caro has served as an agent,
7 an art agent and some other titles I guess he has used on
8 behalf of Robert Indiana.

9 THE COURT: You already got a Lanham Act claim against
10 Robert Indiana for unfair competition Lanham Act relating to
11 what sounds like essentially the same allegations. If
12 Mr. Salama Caro was acting as an agent of Mr. Indiana, why is
13 that not sufficient?

14 MR. KEYHANI: That is the problem. We don't
15 believe -- it is not clear and it appears to me in making those
16 statements he was not acting as an agent of Robert Indiana.
17 That is the exact issue. We also know -- we have learned
18 through discovery that he has worked -- he served as some kind
19 of an affiliate, agent, representative of the Morgan Art
20 Foundation that has -- that turns out through discovery -- some
21 of this is under privilege, but I can share it in this
22 courtroom -- that has rights, that has obtained rights and most
23 if not all of Indiana's works. So he was on behalf of himself
24 and perhaps the art foundation making this claim and so it is a
25 bit convoluted the facts, but there are -- he basically has

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1 control and power over Indiana's works or at least in
2 influencing Indiana and his claim with Christie's and Sothebys
3 his allegations carry a lot of weight so much so that they
4 removed the works.

5 THE COURT: Here is what I think I want to do with
6 this. I have to tell you I am not convinced, but you may have
7 evidence in the record which you can cite in a complaint, in a
8 draft complaint, which you will accompany with your motion
9 papers to amend the complaint to add this Mr. Salama Caro. But
10 I am not convinced that there is sufficient evidence right now
11 that he was not simply acting as the agent of Mr. Indiana. So
12 what you would need to do is, sufficient so that he could have
13 an independent claim against him, what you would need to do is
14 make sure in your complaint make sure what your specific
15 allegations are that would meet the *Iqbal* and *Twombly* standard
16 in order to asserts a cause of action against him individually
17 but we will give you the opportunity to do so and let's set a
18 nearing briefing schedule for that. We're not going to, by the
19 way, delay any of the other dates while this occurs. Because
20 if you have got discovery that you think having Mr. Salama Caro
21 needs to occur if he is part of this case, you can do that as
22 third-party discovery alongside everything else anyway.

23 MR. KEYHANI: Right.

24 THE COURT: If you got good cause to reopen his
25 deposition then you can try to make out a case for good cause

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1 to reopen the deposition.

2 Let me ask Mr. Sesser or Ms. Wallace whether or not
3 you have any opposition if we at least allow briefing on this
4 April letter to amend the complaint to add this fellow? I
5 understand you are not going to with enthusiasm endorse the
6 addition of this party, but do you have any opposition to
7 setting a briefing schedule?

8 MR. SESSER: No. I have no opposition for setting a
9 briefing schedule for that. Our intent would be if an -- if a
10 further amendment is made to the complaint, we would file a
11 motion to dismiss for the grounds that we had set forth in our
12 letter from April. So I don't think any of that changes
13 whether Mr. Salama Caro is in the case or not in the case
14 frankly. I think the grounds are pretty much the same.

15 THE COURT: Right.

16 MR. SESSER: So it really doesn't affect our plans.

17 Mr. Salama Caro is obviously not represented by us.
18 He has other counsel. He was a party in a related lawsuit that
19 Judge Batts just dismissed earlier in November.

20 THE COURT: I read that opinion. What is the
21 relationship between that case and this case, if any?

22 MR. SESSER: Mr. Tovar who is the plaintiff in the
23 other case was a purchaser of these works from Mr. Gilbert,
24 Mr. Keyhani client.

25 THE COURT: Let's set a briefing schedule for this.

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1 MR. KEYHANI: Your Honor, just to clarify. You said
2 you want to propose an amended complaint. You also want a memo
3 letter?

4 THE COURT: You will make a motion to amend and then
5 you will attach a copy of your proposed amended pleadings with
6 those papers. One of the possibilities is that defendants will
7 say the defendants will say amendment is futile or Mr. Salama
8 Caro will -- well, until he is in, he is not in. We will see
9 if there is a futility argument or not. We'll proceed with
10 your motion as well and we'll talk about that in a second.

11 MR. KEYHANI: Your Honor, just so you have a complete
12 record of the correspondence a couple days ago defendants sent
13 you the April 1, April 4th response letter. There was a reply
14 letter that wasn't sent. I would like to provide that for you.
15 It is April 9th letter, a reply letter, that was not faxed or
16 was delivered to you rather just for you so you have a full
17 record. You probably could get it from Judge Batts.

18 THE COURT: Sure. Hand it to my deputy.

19 Let's do the following briefing schedule and then,
20 Mr. Sesser, why don't we then talk about your briefing schedule
21 as well and see if we can do it on the same schedule.

22 Since this has been pending so long and you know the
23 facts so well, Mr. Keyhani, that we would do December 16th with
24 a response of January 6th and then if there is a reply needed,
25 and I don't know that it will be needed, January 13th. I

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1 assume these papers will be very short because you are going be
2 piggybacking on the unfair competition claims and you will be
3 citing evidence that you got in your --

4 MR. KEYHANI: Yes.

5 THE COURT: Now, Mr. Sesser, with your motion you have
6 a motion for summary judgment based on lack of subject matter
7 jurisdiction?

8 MR. SESSER: Yes. I think there is also a motion for
9 summary judgment if there is subject matter jurisdiction.
10 Essentially some part of the motion is that during the
11 deposition of the plaintiff Mr. Gilbert conceded that this
12 particular disputed work, which is known as English Prim was
13 not conceived by Mr. Indiana, was not designed by Mr. Indiana,
14 that Mr. Indiana never put pen to paper relating to this work,
15 he didn't fabricate the work and he didn't supervise the
16 fabrication of the work. So given those admissions by the
17 plaintiff that there could be no claim based on Mr. Indiana's
18 statement that it is not his work. So that is kind of the sum
19 and the substance of it.

20 THE COURT: What is the lack of subject matter
21 jurisdiction?

22 MR. SESSER: Mr. Gilbert is a U.S. citizen but not a
23 citizen of the state. He was domiciled in India at the time
24 the complaint was filed. When we deposed Mr. Gilbert, he
25 naturally talked about his residence in India and I asked him

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1 if he had an intent to remain and he said yes that he did and I
2 believe that is the standard for domicile.

3 THE COURT: I actually just dismissed a case on very
4 similar grounds. It probably posted this past week. I will
5 wait to see what you have got to say on that where there was a
6 domicile in Canada, an American Airlines case.

7 What do you propose for a briefing schedule for that?

8 MR. SESSER: I think we could do December 19th for
9 that.

10 THE COURT: December 19th. So it is a couple days
11 after the other. So it gives you a couple days. I call it
12 breathing room. Not a lot of breathing room but you will be
13 getting his brief, Mr. Keyhani's brief on the 16th.

14 MR. SESSER: Yes.

15 MR. KEYHANI: Your Honor, if we just because of the
16 holidays coming up move it so I don't have to be doing the
17 briefing on Christmas day. We would be responding or working
18 on a response if it was possible to push back.

19 THE COURT: Why don't we deal with that in terms of
20 the opposition timing.

21 MR. KEYHANI: Fair enough.

22 THE COURT: I would like to have it on the 19th
23 because I will have time during the holidays to start reviewing
24 some of the law in this area. So why don't we go with the
25 19th.

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1 And then for the opposition then, Mr. Keyhani, what
2 are you thinking you would need? A summary judgment is
3 different than amending a pleading to add a party. In light of
4 the holidays, how about 30 days?

5 MR. KEYHANI: December --

6 THE COURT: No, January.

7 THE DEPUTY CLERK: The 23rd.

8 MR. KEYHANI: I am going to be traveling to Hawaii.
9 Can I get another week?

10 THE COURT: I think it is great beach reading.

11 MR. KEYHANI: Sometimes. If you are down in Florida,
12 but not Hawaii because it will be nice there.

13 THE COURT: Normally it is 20 days, but we have the
14 holidays. What are your Hawaii plans?

15 MR. KEYHANI: I am planning -- I was going to Maui
16 where I am from on January 7th, 6th or 7th, and coming back the
17 following weekend or the Monday. So on the 15th or 16th.

18 THE COURT: So you are proposing we push it to the
19 23rd?

20 MR. KEYHANI: What date is that, a Monday?

21 THE COURT: A monday.

22 MR. KEYHANI: That's fine.

23 THE COURT: So 1-23. And 1-30 for any reply,
24 Mr. Sesser. If you find that the 56.1 or there are additional
25 factual issues that require a little more time, we can expand

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1 that by a few days if the reply time is not sufficient.

2 MR. SESSER: Could we make that 10 days?

3 THE COURT: Sure. Let's do that. That would put us
4 at February 2. Make a reply February 2nd. The motion for
5 summary judgment by the defendants will be submitted to the
6 Court on December 19th with an opposition on the 23rd of
7 January and a reply on the second of February. I think that
8 takes care of the potential motions that you folks have been
9 talking about to date.

10 MR. KEYHANI: Yes, your Honor. I know we're not
11 arguing motions, but I would like to make a couple sentence
12 about a couple factual points that Mr. Sesser raised.

13 THE COURT: Sure.

14 MR. KEYHANI: If the Court would indulge me
15 Mr. Gilbert never testified that he conceded the idea of the
16 Prim. It is a misrepresentation of his testimony.

17 THE COURT: Presumably I will get the deposition. I
18 did this this morning with another summary judgment motion.
19 Let me suggest I would like the entire transcript because I
20 find that when people give me excerpts for very important
21 transcripts, sometimes I am left hanging. It is like going to
22 a movie and not getting the punchline. So just today I had to
23 ask parties to give me the entirety. That is not true for
24 cases with gazillions of depositions. But for this case I
25 would like the entirety. The same for Mr. Salama Caro I would

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1 like the entire deposition.

2 MR. SESSER: When you say "video deposition," would
3 you like the video portion?

4 THE COURT: If you think it is relevant. If you think
5 the visual portion is relevant then, yes. If the visual
6 portion does not add much, I just assume not have to put it in
7 the computer.

8 MR. KEYHANI: Another point, which your Honor you
9 handle a lot of cases and you may forget these specific facts,
10 John Gilbert is a U.S. citizen. He has a residence in New
11 York, was in India on a business and tourist visa for an
12 extended period of time, but never changed his domicile. If
13 you look, as your Honor is familiar with, domicile law is
14 nuanced and you have to have intent to permanently move to
15 another location, not just the fact that you are staying there
16 for a certain period time. Even the tax code has a distinction
17 between bona fide residence and domicile. Obviously Gilbert,
18 and the record is very clear, in fact he is no longer there.
19 He has moved to Hawaii for some time.

20 THE COURT: What do you mean for some time? Is he
21 there on a job? Is he there on an extended vacation?

22 MR. KEYHANI: No. He has been there for about six --
23 five months. He has permanently moved to Hawaii. He lives
24 there. His art is there. He has a place. All of that. That
25 is after the filing of this plea so where he is now is not

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1 necessarily at issue but really where he was. For most of his
2 life, he lived in New York. He went to India on a business and
3 tourist visa. He stayed there for a number of years and he
4 would come back and forth to New York. He never intended to
5 make India his domicile and there is a lot of law on that.

6 THE COURT: Mr. Keyhani, I understand the point. It
7 is a mixture of law and fact so you can brief that.

8 MR. KEYHANI: Absolutely.

9 THE COURT: There will be another aspect of the
10 summary judgment motion that is separate and apart from the
11 jurisdictional issue as well that will be briefed.

12 MR. KEYHANI: That is all I wanted to point out, your
13 Honor.

14 THE COURT: You will put in whatever evidence there is
15 on that and Mr. Sesser or Ms. Wallace will do the same and
16 we'll sort through it.

17 MR. KEYHANI: Thank you.

18 THE COURT: Being a U.S. citizen if you are not
19 domiciled here does create some issues, but you have facts that
20 suggest that he is domiciled or was at the time and you'll put
21 those forward.

22 Let's walk through some of the other dates that we
23 have got for this case. I think there was not a general all
24 purpose case management order put in place. We'll issue one.
25 We'll have the following dates put in place. Actually, before

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1 that let me just go through a couple of our normal questions,
2 which is do the parties consent or not consent to having all
3 proceedings, including trial, of this matter occur before a
4 magistrate?

5 MR. KEYHANI: Your Honor, I do not have a problem with
6 that. We're fine with having the magistrate. Either way is
7 fine. We do consent.

8 MR. SESSER: We do not.

9 THE COURT: Have settlement discussions taken place?

10 MR. KEYHANI: Yes, your Honor. A number of them have
11 taken place.

12 THE COURT: I don't want to know about the contents.

13 MR. KEYHANI: They have taken place but we have not
14 resolved the case.

15 THE COURT: Do you think it will be useful to have a
16 reference to a magistrate judge for purposes of settlement?

17 MR. KEYHANI: Perhaps.

18 THE COURT: I will tell you what I will do, we'll
19 issue an order with a reference to magistrate judge for
20 settlement purposes. You need not take advantage of that. I
21 am not going to order you to a settlement conference or
22 mediation conference, but we'll notify the magistrate assigned
23 to this matter that there is a reference for settlement. If
24 you jointly agree that it will be useful, you can proceed in
25 that way.

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1 I take it you've all done whatever you have to do
2 under Rule 26 at this late date?

3 MR. KEYHANI: Yes.

4 MR. SESSER: Yes.

5 THE COURT: So the fact discovery in this case we're
6 going to suggest should be completed. I had originally had it
7 by February 3, but let's move that by two weeks because of the
8 briefing that we have now got on here.

9 What would be a February 3 plush 14, February 17.
10 That is going to be the close of all fact discovery. Any final
11 requests for production of documents should be done before the
12 end of this month. If you believe you need to ask for
13 documents relating to a Mr. Salama Caro, don't wait until after
14 you've gotten a decision on the motion to join. You should do
15 it by subpoena.

16 MR. KEYHANI: Yes.

17 THE COURT: Interrogatories by January 6 if any.
18 Depositions to be completed by again February 17th. Request to
19 admit would be a few days. I am moving the dates now because
20 of the briefing.

21 Give me one week, Joe, after February 17th.

22 THE DEPUTY CLERK: 24th.

23 THE COURT: February 24th. Are there going to be any
24 experts in this matter if this is not resolved on summary
25 judgment?

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1 MR. KEYHANI: Yes, your Honor. We anticipate a couple
2 of experts in this case.

3 THE COURT: So let's have expert disclosures of who
4 they are and why don't you work out the reports. You will be
5 doing it in a fairly tight time frame because we have fact
6 discovery completed on February 17th and we're going to set
7 this matter down for trial on April 9th and what we're going to
8 do is build in your expert disclosures of the names and also
9 your reports. Why don't you folks confer and --

10 MR. KEYHANI: Get back to you about that.

11 THE COURT: Right. Don't get back with competing
12 letters that contain argument. Get back either with dates or
13 say we cannot agree on dates and I will set dates for you.

14 MR. KEYHANI: Fair enough.

15 THE COURT: A final pretrial order on March 23rd.
16 And a final pretrial conference, Joe, one week after
17 that?

18 THE DEPUTY CLERK: March 30.

19 THE COURT: What time of day?

20 THE DEPUTY CLERK: 1:00.

21 THE COURT: March 30th at 1:00 p.m. Is this to be
22 tried to a jury?

23 MR. KEYHANI: Yes.

24 THE COURT: You say for a week?

25 MR. KEYHANI: About a week.

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1 THE COURT: Mr. Sesser, do you agree with that?

2 MR. SESSER: That is probably about right.

3 MR. KEYHANI: It could take a day or two more.

4 THE COURT: We'll do the box method and get a jury on
5 the first day.

6 I think those are the dates, Rebecca.

7 The pretrial order. I guess the last thing is the
8 final pretrial order. That is March 23rd. Those are matters
9 that I had to raise. Is there anything else that you folks
10 would like to raise today?

11 MR. KEYHANI: I don't believe so, your Honor.

12 MR. SESSER: One thing in relation to the motion.

13 THE COURT: Your motion, Mr. Sesser?

14 MR. SESSER: Yes. Although, I think it is Mr.
15 Keyhani's issue actually. With respect to Mr. Gilbert's
16 citizenship, we intend to rely on tax returns that he filed. I
17 think that Mr. Keyhani previously had a confidentiality concern
18 related to that. I think a special court order is required to
19 file something under seal. We went back and forth last spring
20 on this and we were happy to file it under seal if Mr. Keyhani
21 got the order authorizing that.

22 THE COURT: Is there a protective order in this case?

23 MR. KEYHANI: No, your Honor. If we can have a
24 protective order entered in this case. We already have the
25 documents that have been designated as attorneys eyes and we

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1 can put those under the protective order. That will be fine.

2 THE COURT: I am sure that you folks must have
3 protective orders that you can --

4 MR. SESSER: There is a separate protective order, but
5 it does not deal with these particular documents. That was the
6 issue.

7 MR. KEYHANI: We can have a general one, yes, your
8 Honor.

9 MR. SESSER: As long as we can use the documents,
10 we're fine with confidentiality. Just we want to be able to
11 use them in connection with the motion.

12 THE COURT: As an isolated matter, the documents
13 relating to the tax returns of Mr. Gilbert may be filed under
14 seal in connection with motions that are to occur on the
15 schedules we discussed today. That is so ordered.

16 There is a separate issue I am a little confused by.
17 Is there a protective order signed between the two parties in
18 this case?

19 MR. KEYHANI: No, there is not one. A broad one.
20 There were a couple documents that was a deal over, but there
21 is not a protective order in this case.

22 THE COURT: You may not need one if it turns out the
23 only documents you want to file under seal relate to these tax
24 returns. If this is going to be a bigger issue that is going
25 to affect other documents in connection with a motion for

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1 summary judgment or something else because a deposition that
2 has been designated as confidential or something else, I would
3 suggest you do a general protective order which I can so order
4 which will contain a provision for the filing of those
5 documents. That happens all the time. That allows us not to
6 come back for individual orders for sealing every time.

7 MR. KEYHANI: I believe there is a document. The
8 agreement is with the Morgan Art Foundation that was used in
9 the other case that we want to use. So we may want to have a
10 protective order to cover that.

11 THE COURT: Why don't you folks confer on that. If
12 you have one, you can contain a provision in it for filing
13 documents under seal. There are lots of examples on ECF and
14 then I can so order it if you comply with the normal kinds of
15 provisions.

16 Anything else?

17 MR. SESSER: I don't think so.

18 MR. KEYHANI: Thank you.

19 THE COURT: I have set the dates in this case. We
20 have some motions coming. I will deal with them promptly.
21 We'll have a trial on April 9th if this is not resolved by
22 motion or otherwise. I am quite interested and anxious to have
23 as many trials as possible. I already have had some and am
24 going to continue to have as many as possible. I do not
25 hesitate to set things down for trial. I will hold these dates

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1 also. I will not be moving the dates. So this is not a fake
2 trial date.

3 MR. KEYHANI: Your Honor, we look forward to it.

4 THE COURT: We're adjourned.

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